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3 JUDGE JOHN H. CHUN  
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UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON

9 UNITED STATES OF AMERICA,

10 Plaintiff

11 vs.

12 DWIGHT HENLINE,

13 Defendant.

14 NO. 2:22-CR-69 JHC

15 DEFENDANT'S PROPOSED JURY  
16 INSTRUCTION

17 Dwight Henline, through counsel, David Hammerstad and Joshua Saunders, offers the  
18 following proposed jury instruction as an alternative to the “to convict” instruction offered by the  
19 government (Government’s requested concluding trial instruction #13, Dkt 62 at 33).

20 The defense agrees to the government’s requested instruction, with the exception of the  
21 paragraph defining the mens rea “maliciously.” The defense proposes the following alternative  
22 wording for that paragraph:

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26 DEFENDANT'S PROPOSED JURY INSTRUCTION  
27 (*U.S. v. Henline; 22-69 JHC*)

28 The Law Office of David Hammerstad, LLC  
1000 2<sup>nd</sup> Avenue, Suite 3140  
Seattle, Washington 98104  
Tel. 206.445.0215  
e-mail: david@hammerstadlaw.com

1 "A person acts “maliciously” if he either intentionally damages or destroys the building  
 2 or acts with willful disregard of the fact that damage or destruction is likely to result from his  
 3 acts. A person acts with “willful disregard” if the person is subjectively aware of the likelihood  
 4 that his actions will damage or destroy the property in question and takes the actions  
 5 nonetheless."

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 8 The case law makes clear that the mens rea “malicious” requires that the defendant be  
 9 subjectively aware that damage or destruction is the likely result of his actions. The *Togonon v.*  
 10 *Garland* decision, which did not address the issue of jury instructions, took as a given that to be  
 11 convicted under the malicious mens rea standard, the defendant had to be subjectively aware that  
 12 damage or destruction was the “probable consequence” of his actions. 23 F.4<sup>th</sup> 876, 879 (9<sup>th</sup> Cir.  
 13 2022), The Eighth Circuit, in *United States v. Lung’Aho*, 72 F.4<sup>th</sup> 845 (8<sup>th</sup> Cir. 2023), articulated  
 14 where “malicious” falls in the taxonomy of *mens rea*, explaining that maliciousness requires the  
 15 willful disregard of the “likelihood” that the harm will be caused, more than mere recklessness,  
 16 which requires willful disregard of a “substantial and unjustified” risk, and less than knowledge,  
 17 which requires “practical certainty.” *Id.* at 850.

20 The defense instruction states the *mens rea* more clearly than the government’s proposed  
 21 instruction, which requires that the defendant act with “willful disregard of the likelihood that  
 22 damage or destruction would result from his acts.” The phrase “of the likelihood” could be  
 23 interpreted by the jury as any likelihood, be it a small or large likelihood. Also, changing the  
 24 word “would” to “will” strengthens the instruction.

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Moreover, use of the word “risk” in the second sentence proposed by the government:  
“a person acts with “willful disregard” if the person is subjectively aware of the risk that his  
actions will damage or destroy the property and takes the actions nonetheless,” could again  
suggest that that the defendant could be convicted if he were aware of any risk, and allow the  
jury to convict on a showing of a lesser mens rea. The word “likelihood” is an appropriate  
substitution for the work “risk.”

DATED this 6<sup>th</sup> day of November, 2023

/s/ David Hammerstad  
David Hammerstad #34255  
Attorney at Law  
Law Office of David Hammerstad, LLC  
1000 2<sup>nd</sup> Ave, Suite 3140  
Seattle, WA 98104  
(206) 445-0215

DEFENDANT’S PROPOSED JURY INSTRUCTION  
(U.S. v. Henline; 22-69 JHC)

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